No. 15-628

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IN THE

Supreme Court of the United States

BASSAM YACOUB SALMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* MARK CUBAN IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORTIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. PEOPLE WHO TRADE LAWFULLY SHOULD NOT HAVE TO FEAR BECOMING A DEFENDANT IN A GOVERNMENT PROCEEDING 3

II. OTHER THAN IN THE LIMITED CONTEXT OF SHORT-SWING TRADING, CONGRESS PROVIDED NO PROSCRIPTION AGAINST INSIDER TRADING IN THE EXCHANGE ACT 4

III. DESPITE HAVING MANY OPPORTUNITIES, CONGRESS HAS FAILED TO CODIFY OR OTHERWISE DEFINE INSIDER TRADING 7

IV. RESPONDENT MAY NOT CREATE THE LAW OF INSIDER TRADING BY INCREASINGLY PURSUING PROSECUTIONS BASED UPON EXPANDED THEORIES OF LIABILITY 10

Table of Contents

Page

V. THE NINTH CIRCUIT INAPPROPRIATELY REJECTED THE SECOND CIRCUIT'S HOLDING REGARDING THE PERSONAL BENEFIT REQUIREMENT 13

VI. RESPONDENT'S PROPOSED DIMINUTION OF WHAT IS NEEDED TO DEMONSTRATE PERSONAL BENEFIT MUST BE REJECTED 14

CONCLUSION 18

TABLE OF CITED AUTHORITIES

Page

CASES

Bateman Eichler, Hill Richards, Inc. v. Berner,
472 U.S. 299 (1985) 7

Blau v. Lehman,
368 U.S. 403 (1962) 5

Bob Jones Univ. v. United States,
461 U.S. 574 (1983) 10

Chiarella v. United States,
445 U.S. 222 (1980) 5, 6, 7, 10

Dirks v. SEC,
463 U.S. 646 (1983) ..... *passim*

Gustafson v. Alloyd Co.,
513 U.S. 561 (1995) 16

In re Cady, Roberts & Co.,
40 S.E.C. 907 (1961) 5

Norwood v. Kirkpatrick,
349 U.S. 29 (1955) 7

SEC v. Obus,
693 F.3d 276 (2d Cir. 2012) 13

SEC v. Payton,
97 F. Supp. 3d 558 (S.D.N.Y. 2015) 13

Cited Authorities

Page

SEC v. Tex. Gulf Sulfur Co.,
401 F.2d 833 (2d Cir. 1968) 5

United States v. Jiau,
734 F.3d 147 (2d Cir. 2013).....17

United States v. Newman,
773 F.3d 438 (2d Cir. 2014) ..... *passim*

United States v. O'Hagan,
521 U.S. 642 (1997).....16

United States v. Whitman,
904 F. Supp. 2d 363 (S.D.N.Y. 2012).....13

STATUTES AND LEGISLATIVE HISTORY

15 U.S.C. § 78p(b) 4

15 U.S.C. § 78j(b).....2

15 U.S.C. § 78u.....8

2 ALI Fed. Sec. Code § 1603 8

H.R. 7852, 73d Cong. § 15(b) 5

H.R. Rep. No. 100-910 (1988).....9

S. Rep. 2693, 73d Cong. § 15(b) 5

Cited Authorities

Page

Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4677 (1988) 9

Insider Trading Proscriptions Act of 1987.....8

Insider Trading Sanctions Act of 1984.....8

OTHER AUTHORITIES

Donald Cook & Myer Feldman, *Insider Trading Under the Securities Exchange Act*, 66 Harv. L. Rev. 385 (1953) 4

Fred D'Amato, *Comment: Equitable Claims to Disgorged Insider Trading Profits*, 1989 Wis. L. Rev. 1433 (1989).....9

Harvey L. Pitt & Karen L. Shapiro, *The Insider Trading Proscriptions Act of 1987: A Legislative Initiative for a Sorely Needed Clarification of the Law Against Insider Trading*, 39 Ala. L. Rev. 415 (1988).....2

Harvey L. Pitt, et al., *Problems of Enforcement in the Multinational Securities Market*, 9 U. PA. J. INT'L L. 375 (1987) 8

Henry G. Manne, *In Defense of Insider Trading*, 44 Harv. Bus. Rev. 113 (1966).....12

Cited Authorities

Page

Jeffrey A. Miron, *An Economic Defense of Insider Trading* (2012) 12

Jonathan R. Macey, Cato Policy Analysis No. 101, *SEC's Insider Trading Proposal: Good Politics, Bad Policy*, Mar. 31, 1988 9

Lisa Shidler, *Persecuted Mark Cuban Prosecutes the SEC and Wins Some Mea Culpas from Christopher Cox*, RIABIZ (Dec. 10, 2014).....3

Miriam R. Albert, *Company Registration in its Historical Context: Evolution Not Revolution*, 9 U. Miami Bus. L. Rev. 67 (2001) 7-8

Oliver P. Colvin, *A Dynamic Definition of and Prohibition Against Insider Trading*, 31 Santa Clara L. Rev. 603 (1991).....9

Roberta S. Karmel, *A Critical Look at SEC Insider Trading Policies*, N.Y.L.J., Feb. 19, 2015 12

Statement Concerning Codification of the Federal Securities Laws, Securities Act Release No. 33,6242 (Sept. 22, 1980).....8

Stephen Bainbridge, *Insider Trading: An Overview* (2000).....12

Cited Authorities

Page

Victor Brudney, *Insiders, Outsiders, and Informational Advantages Under the Federal Securities Laws*, 93 Harv. L. Rev. 322 (1979) 15

INTEREST OF AMICUS CURIAE[1]

Mark Cuban is a successful businessman, an investor, the owner of several business ventures, including the NBA's Dallas Mavericks, and one of the stars of the popular television show "Shark Tank." He was pursued by the Securities and Exchange Commission for over six years based on a novel theory of insider trading. A jury ultimately exonerated Mr. Cuban on all charges, but not without significant cost—both monetary and personal—to Mr. Cuban. Mr. Cuban knows all too well from personal experience that if the Government labels an individual an "insider trader," no matter how novel the theory of liability, the individual is faced with a decision whether to succumb to a settlement despite not believing that the conduct violated the law (and thereby suffer the attendant financial, injunctive and reputational costs) or mount an expensive and time-consuming defense that is likely to take years to resolve.

While Mr. Cuban was fortunate enough to have the financial resources to defend himself, others may not be so fortunate. Mr. Cuban has an interest in seeing that traders are not swept into the Government's insider trading dragnet based on novel theories of liability that have no footing in the securities statutes or this Court's

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1. Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* affirms that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* and his counsel made a monetary contribution intended to fund the brief's preparation or submission. Respondent's letter consenting to the filing of this amicus brief, as well as Petitioner's letter granting blanket consent to the filing of *amicus curiae* briefs, are on file with the Clerk.

precedent. Mr. Cuban submits that the Court should reject the holding of the Ninth Circuit in this case, which adopts the Government's overly expansive view of insider trading and outlaws activities that are legal under established precedent.

SUMMARY OF ARGUMENT

No one should be prosecuted for conduct that Congress is either unwilling or unable to define. However, that is precisely what is occurring with respect to the Department of Justice's and the SEC's pursuit of insider trading claims under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b). In the decision below, the Ninth Circuit allowed an expansion of insider trading parameters that is not covered by the statute.

Although Congress has been repeatedly challenged and even beseeched to provide a definition of insider trading as it relates to Section 10(b), it has declined to do so. Instead of a statutory definition with boundaries, there is a patchwork of judicial decisions cobbling together, on a case-by-case basis, what conduct gives rise to liability. This has resulted in an "intolerable degree of uncertainty." Harvey L. Pitt & Karen L. Shapiro, *The Insider Trading Proscriptions Act of 1987: A Legislative Initiative for a Sorely Needed Clarification of the Law Against Insider Trading*, 39 Ala. L. Rev. 415, 416 (1988).

In the decision below, the Ninth Circuit affirmed the Government's pursuit of insider trading claims even though there was no "exchange [between the alleged tippee and alleged tipper] that is objective, consequential and represents at least a potential gain of a pecuniary or

similarly valuable nature." *See United States v. Newman*, 773 F.3d 438, 452 (2d Cir. 2014), *cert. denied*, 136 S. Ct. 242 (2015). The holding of the Ninth Circuit is wrong and should be rejected.

ARGUMENT

I. PEOPLE WHO TRADE LAWFULLY SHOULD NOT HAVE TO FEAR BECOMING A DEFENDANT IN A GOVERNMENT PROCEEDING

While it might seem to go without saying that an individual who lawfully trades his or her stock should not suddenly find his or her name in the caption of a Government enforcement proceeding, that is precisely what happened to Mr. Cuban. He spent over six years and millions of dollars defending against novel insider trading allegations by the SEC. While he was offered the opportunity to settle for much less than his defense costs, he refused because he had done nothing wrong. Although a jury fully vindicated Mr. Cuban after only four hours of deliberation, Mr. Cuban's defense to the SEC's charges was not without significant costs. Not only was he forced to spend a considerable amount of time and money on his defense, but he also lived under the bright light of the SEC's allegations while the case was pending. For example, he was jeered when attending Dallas Mavericks games by chants of "insider trading." *See* Lisa Shidler, *Persecuted Mark Cuban Prosecutes the SEC and Wins Some Mea Culpas from Christopher Cox*, RIABiz (Dec. 10, 2014), http://www.riabiz.com/a/4938825004482560/persecuted-mark-cuban-prosecutes-the-sec-and-wins-some-mea-culpas-from-christopher-cox.

Congressional codification of exactly what constitutes insider trading is required. Absent that, the courts—and this Court in particular—must continue to reject the Government's attempts to expand insider trading proscriptions through litigation pursuant to which innocent traders find themselves ensnared in insider trading prosecutions.

II. OTHER THAN IN THE LIMITED CONTEXT OF SHORT-SWING TRADING, CONGRESS PROVIDED NO PROSCRIPTION AGAINST INSIDER TRADING IN THE EXCHANGE ACT

While Congress was aware of concerns regarding insider trading at the time the Securities Exchange Act of 1934 was enacted, *see, e.g.*, Donald Cook & Myer Feldman, *Insider Trading Under the Securities Exchange Act*, 66 Harv. L. Rev. 385, 386 (1953), the Act addresses only a narrow subspecies of insider trading—namely, where a director, beneficial owner, or officer personally achieves short-swing profits by using nonpublic information to make both a purchase and a sale of company stock within six months of each other. Securities Exchange Act of 1934, ch. 404, tit. 1, § 16(b) (codified as amended at 15 U.S.C. § 78p(b)). And even in that situation, only the company (or a shareholder acting derivatively on behalf of the company) may sue for disgorgement; there is no criminal liability, and the SEC may not bring an action to enforce the prohibition. *Id.* More important, Congress specifically rejected the concept of tippee liability for insider trading.[2]

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2. A draft version of the Exchange Act would have barred certain corporate insiders from sharing confidential information with outsiders, and tippees who traded on illegally disclosed information

Despite the lack of Congressional proscription (or even intent) regarding insider trading beyond the limited context of Section 16(b), the SEC has not hesitated to argue that Section 10(b)'s fraud provision and Rule 10b-5 broadly proscribe "insider trading." Addressing the issue in *In re Cady, Roberts & Co.*, 40 S.E.C. 907 (1961), the SEC held that a trader committed a fraud—and thus violated Rule 10b-5—whenever he or she traded while knowing material nonpublic information that the counterparty did not. In effect, the SEC demanded a parity of information between traders: A trader either had to disclose his informational asymmetry or abstain from trading. *See Chiarella v. United States*, 445 U.S. 222, 227 (1980).

This expansive view of insider trading had no basis in the Exchange Act—indeed, it went well beyond Congress' narrow proscription in Section 16(b) against short-swing trades by a limited group of insiders. The SEC nevertheless managed to convince lower courts to adopt its "disclose or abstain" rule, and many successful (but baseless) insider trading actions were brought accordingly. *See, e.g., SEC v. Tex. Gulf Sulfur Co.*, 401 F.2d 833 (2d Cir. 1968).

The SEC pressed its flawed parity-of-information rule for nearly two decades. It jettisoned the rule only when this Court reversed a decision of the Second Circuit to hold that information parity is "inconsistent with the

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would have had to disgorge to the issuer profits realized within six months of the disclosure (unless they could establish certain affirmative defenses). *See Blau v. Lehman*, 368 U.S. 403, 411-12 & n.12 (1962) (citing H.R. 7852, 73d Cong. § 15(b); S. Rep. 2693, 73d Cong. § 15(b)). But even this limited provision for tippee liability was eliminated from the Act prior to enactment. *Id.*

careful plan that Congress has enacted for regulation of the securities markets." *Chiarella*, 445 U.S. at 235. The *Chiarella* Court explained that Congress did not outlaw all forms of insider trading but only those that constitute fraud. *Id.* Trading on nonpublic information is fraudulent only when the investor has an independent duty under the common law to disclose that information or abstain from trading. *Id.* By contrast, the SEC's parity-of-information rule had created a "general duty between all participants in market transactions to forgo actions based on material, nonpublic information" and thus "depart[ed] radically" from both the Exchange Act and established fraud doctrine. *Id.* at 233.

Despite the setback in *Chiarella*, the SEC continued to press for expanded insider trading proscriptions. Three years after *Chiarella*, this Court again took up the issue in *Dirks v. SEC*, 463 U.S. 646 (1983). There, the SEC had charged an analyst with insider trading after he had received and passed on to traders information from insiders concerning corruption at a financial firm. *Id.* at 648-49. The SEC's position was that the analyst automatically inherited the insiders' common law duty not to trade on confidential information by virtue of having received information from those insiders. *Id.* at 655-56. In other words, the SEC believed that every tippee is subject to the parity-of-information rule. *Id.*

Once again, this Court rejected the SEC's view of insider trading as overly expansive. After repeating *Chiarella*'s holding that there can be no liability for insider trading unless there is a fraud, *id.* at 666 n.27, the Court held that a tippee does not *per se* acquire a duty to disclose or abstain whenever he acquires insider information, *id.* at

659. To the contrary, a tippee "assumes a fiduciary duty to the shareholders of a corporation not to trade on material nonpublic information *only* when the insider has breached his fiduciary duty to the shareholders by disclosing the information to the tippee and the tippee knows or should know that there has been a breach." *Id.* at 660 (emphasis added); *accord Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 313 (1985) (explaining that *Chiarella* and *Dirks* make clear that "a tippee's use of material nonpublic information does not violate § 10(b) and Rule 10b-5 unless the tippee owes a corresponding duty to disclose the information").

History demonstrates that the Government will relentlessly push to expand the outer limits of what constitutes insider trading until it is reined in. But expanding the reach of the insider trading laws is the purview of Congress, not of the Executive Branch or the courts. *See, e.g., Norwood v. Kirkpatrick*, 349 U.S. 29, 40 (1955) (holding that a court's role is to "interpret [a statute,] not to expand and enlarge upon it"). And time and again, Congress has declined to define insider trading.

III. DESPITE HAVING MANY OPPORTUNITIES, CONGRESS HAS FAILED TO CODIFY OR OTHERWISE DEFINE INSIDER TRADING

Beginning in 1969, a group of esteemed securities academics and practitioners, led by Harvard Professor Louis Loss, drafted the American Law Institute's Federal Securities Code ("ALI Code"). The ALI Code, completed in 1978, was an attempt to re-codify the six federal securities statutes into a single comprehensive code. *See* Miriam R. Albert, *Company Registration in its Historical Context:*

Evolution Not Revolution, 9 U. Miami Bus. L. Rev. 67, 78-79 (2001). Section 1603 of the ALI Code specifically prohibited insider trading. *See* 2 ALI Fed. Sec. Code § 1603 (1978). Section 1603(b) defined insiders to include an expansive group of individuals (including both direct and indirect tippees) and proposed to codify the "concept of an insider's affirmative duty not to trade without disclosure." *See id.* § 1603 cmts. 2(e), 3(e).

The SEC endorsed the ALI Code, *see* Statement Concerning Codification of the Federal Securities Laws, Securities Act Release No. 33,6242 (Sept. 22, 1980), and in 1980 it was presented to Congress. Despite formal approval by the ALI, endorsement by the SEC, and support of the American Bar Association, the ALI Code was never enacted into law by Congress. Albert, 9 U. Miami Bus. L. Rev. at 80-81.

Congress next had an opportunity to address insider trading when it passed the Insider Trading Sanctions Act of 1984, a law that permits the SEC to impose a treble damages sanction on an individual who tips or trades while in possession of material nonpublic information in violation of the Exchange Act. *See* 15 U.S.C. § 78u. Congress specifically declined to define insider trading, however, apparently to avoid a debate over the definition that could have stalled passage of the entire legislative package. *See* Harvey L. Pitt, et al., *Problems of Enforcement in the Multinational Securities Market*, 9 U. Pa. J. Int'l L. 375, 382 n.11 (1987).

Yet another opportunity for Congressional action arose in June 1987, when Senators Donald Riegle and Alfonse D'Amato took the issue head on in introducing the Insider Trading Proscriptions Act of 1987. At the Senators' request, the SEC submitted a proposed definition of insider

trading drafted by the Ad Hoc Legislative Committee on Insider Trading, chaired by Harvey Pitt, the agency's former General Counsel who served as its Chairman from 2001 to 2003. *See* Jonathan R. Macey, Cato Policy Analysis No. 101, *SEC's Insider Trading Proposal: Good Politics, Bad Policy*, Mar. 31, 1988; Oliver P. Colvin, *A Dynamic Definition of and Prohibition Against Insider Trading*, 31 Santa Clara L. Rev. 603, 619-20 (1991). The definition was not adopted. *See* H.R. Rep. No. 100-910 (1988), *reprinted in* 1988 U.S.C.C.A.N. 6043.

Congress also considered adoption of an insider trading definition when it enacted the Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4677 (1988). This act added Section 20A to the Exchange Act to create an express private right of action for individuals who trade contemporaneously with an insider trader. *See* Fred D'Amato, *Comment: Equitable Claims to Disgorged Insider Trading Profits*, 1989 Wis. L. Rev. 1433, 1439 & n.29 (1989). In declining to adopt a definition for insider trading, the House Report of the Committee on Energy and Commerce explained that

> the court-drawn parameters of insider trading have established clear guidelines for the vast majority of traditional insider trading cases. . . . Accordingly, the Committee does not intend to alter the substantive law with respect to insider trading with this legislation. The legal principles governing insider trading cases are well-established and widely-known.

H.R. Rep. No. 100-910, at 11, *reprinted in* 1988 U.S.C.C.A.N. 6048.

At the time that statement was made, the "court-drawn parameters of insider trading" were those set out by this Court in *Chiarella* and *Dirks*. Thus, while Congress determined not to codify an insider trading definition, its citation to "court-drawn parameters" indicates an endorsement of the *limitations* that the Court had adopted in those cases. *Cf. Bob Jones Univ. v. United States*, 461 U.S. 574, 601 (1983) ("[i]n view of its prolonged and acute awareness of so important an issue, Congress' failure to act on the [proposed] bills . . . provides added support for concluding that Congress acquiesced in the IRS rulings").

IV. RESPONDENT MAY NOT CREATE THE LAW OF INSIDER TRADING BY INCREASINGLY PURSUING PROSECUTIONS BASED UPON EXPANDED THEORIES OF LIABILITY

The lack of statutory guidance regarding insider trading is made all the more problematic by the ambitious stance of Department of Justice, egged on by the SEC in its own cases (and now by the Ninth Circuit), to take every opportunity to seek an expansion of the parameters of prohibited insider trading by bringing claims based on novel theories for which there is no precedent. Without definitive guidance as to what is a violation and what is not, well-meaning innocent individuals are left in the untenable position of having to worry that what is (and should be) a lawful transaction today will suddenly be alleged by the Government to violate the federal securities laws tomorrow.[3]

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3. Nor is the SEC willing or able to provide timely guidance to those who take the time to inquire whether specific conduct is

The Department of Justice and the SEC, in their ever-broadening campaign against insider trading, seem to have lost sight of the fact that the underlying goal of their enforcement should be to assure that the markets are fair and equitable so that companies and investors are able to participate with confidence, thus encouraging capital formation. Companies need capital to grow, and investors need to know that the companies in which they invest, and the markets in which they transact, will treat them fairly. Pursuing individuals under novel theories does nothing to improve the fairness of the markets.

Indeed, there is no definitive evidence that insider trading creates any inequity in the market. As the late-Professor Henry Manne, a founder of the law and economics discipline, concluded in 1966, the "only stock market participants who are likely to benefit from a rule of preventing insider trading are the short-term speculators

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prohibited. When Mr. Cuban tried to obtain information directly from the SEC regarding whether certain trading constituted illegal insider trading, he was told he could call the SEC's Division of Trading and Markets regarding submission of a no-action letter. http://qz.com/250097/watch-mark-cubans-tirade-against-the-sec-over-protocol-for-insider-trading-avoidance/ (Aug. 15, 2014). Upon calling the number provided, he reached an electronic answering service and was required to leave a voice mail with his request. *Id.* He received a response to his voice mail, referring him to the 1980 Securities Release No. 6269, which sets out the procedure for obtaining a no-action or interpretative letter from the SEC's Division of Corporation Finance. https://www.youtube.com/watch?v=9fDiVXpWp1U (Aug. 14, 2014). In this age of twitter, apps, and instant messaging, it seems that the SEC could provide a more expeditious way of assisting individuals wend their way through the insider trading minefield that it and the Department of Justice have created.

and traders, and not the long-term investors who are regularly stated to be the objects of the SEC's solicitude." Henry G. Manne, *In Defense of Insider Trading*, 44 Harv. Bus. Rev. 113, 114 (1966). Professor Manne posited that a long-term investor "normally sell[s] for reasons unrelated to the insider's trading, and would be selling in any event." *Id.* at 115. Such an investor would be "indifferent to the identity of his buyer" and actually "may benefit from the insider's buying on good news, as the average price received may be higher with than without the insider trading." *Id.* While a debate on the issue has raged on since this assertion, others have more recently taken up the position that insider trading does not undermine investor confidence. *See, e.g.*, Stephen Bainbridge, *Insider Trading: An Overview* (2000), http://ssrn.com/abstract=132529 (concluding that "it is difficult to see why insider trading should undermine investor credibility of the securities market"). Others have gone so far as to assert that a ban on insider trading actually has a detrimental effect on the market. *See, e.g.*, Jeffrey A. Miron, *An Economic Defense of Insider Trading* (2012), http://atlassociety.org/commentary/capitalism-and-morality/capitalism-morality-blog/4932-an-economic-defense-of-insider-trading (arguing that ban on insider trading "leads to less efficient allocation of the economy's capital").

It is not the purpose of this brief to argue definitely for any of these positions. However, given this debate, the Government's laser focus on this issue and attempts to expand its coverage are entirely misplaced. *See, e.g.*, Roberta S. Karmel, *A Critical Look at SEC Insider Trading Policies*, N.Y.L.J., Feb. 19, 2015, at p. 3, col. 1. In 2014, in deciding *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), the Second Circuit agreed. While cited as

a landmark decision regarding insider trading, in fact the Second Circuit did nothing more than appropriately reject the Government's attempt to expand the parameters of prohibited insider trading based on unprecedented novel theories with no statutory or judicial basis.[4]

V. THE NINTH CIRCUIT INAPPROPRIATELY REJECTED THE SECOND CIRCUIT'S HOLDING REGARDING THE PERSONAL BENEFIT REQUIREMENT

A year after *Newman* was decided, the Ninth Circuit—in a decision authored by Judge Jed S. Rakoff, Senior District Judge for the Southern District of New York, sitting by designation—issued the decision now before the Court. Judge Rakoff had already signaled his disagreement with the Second Circuit's *Newman* decision. *See SEC v. Payton*, 97 F. Supp. 3d 558 (S.D.N.Y. 2015) (Rakoff, J.) (while paying lip-service to *Newman*'s "more onerous standard of benefit," finding that allegations made by the SEC similar to those rejected by the Second Circuit in *Newman* were sufficient to plead benefit). *Cf. United States v. Whitman*, 904 F. Supp. 2d 363, 371 n.6 (S.D.N.Y. 2012) (Rakoff, J.) (characterizing as "Delphic" the Second Circuit's holding regarding the personal benefit required in insider trading as set out in *SEC v. Obus*, 693 F.3d 276 (2d Cir. 2012)).

The Ninth Circuit's decision authored by Judge Rakoff declined to follow *Newman* "[t]o the extent *Newman* can

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4. "The Government's overreliance on our prior dicta merely highlights the doctrinal novelty of its recent insider trading prosecutions." *Newman*, 773 F.3d at 448.

be read to go so far" as to endorse Mr. Salman's argument that, "because there is no evidence" that the alleged tipper received "at least a potential gain of a pecuniary or similarly valuable nature . . . in exchange for the inside information, or that Salman knew of any such benefit, the Government failed to carry its burden." Appendix to the Petition for Writ of Certiorari ("Pet. App.") 3, 15-16. The Ninth Circuit thus based its holding entirely on the relationship between the alleged tipper and alleged tippee. The problem with the Ninth Circuit's decision—as recognized by the Second Circuit in coming to the opposite conclusion—is that it affirms a criminal conviction that has no basis in statutory law or in this Court's decisions addressing insider trading.

VI. RESPONDENT'S PROPOSED DIMINUTION OF WHAT IS NEEDED TO DEMONSTRATE PERSONAL BENEFIT MUST BE REJECTED

As Mr. Salman correctly observed in his Petition for a Writ of Certiorari, "[i]f a close family relationship between the insider and the tippee is enough to establish a personal benefit for the insider, as the Ninth Circuit held here, then Salman loses." Pet. 2. However, a careful reading of this Court's decision in *Dirks*—which is the basis of the Ninth Circuit's decision—makes clear that the Ninth Circuit's decision in *Salman* is not correct and that a close family relationship does not by itself establish a personal benefit.

In *Dirks*, the Court held that a tippee "assumes a fiduciary duty to the shareholders of a corporation not to trade on material nonpublic information *only* when the insider has breached his fiduciary duty to the shareholders by disclosing the information to the tippee and the tippee knows or should know that there has been a breach." 463 U.S. at 660 (emphasis added). To determine whether there

has been a breach of duty, a court must:

> focus on objective criteria, i.e., whether the insider receives a direct or indirect personal benefit from the disclosure, such as a pecuniary gain or a reputational benefit that will translate into future earnings. There are objective facts and circumstances that often justify such an inference. For example, there may be a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or an intention to benefit the particular recipient. The elements of fiduciary duty and exploitation of nonpublic information also exist when an insider makes a gift of confidential information to a trading relative or friend. The tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient.

Id. at 663-64 (citing Victor Brudney, *Insiders, Outsiders, and Informational Advantages Under the Federal Securities Laws*, 93 Harv. L. Rev. 322, 348 (1979) ("[t]he theory . . . is that the insider, by giving the information out selectively, is in effect selling the information to its recipient for cash, reciprocal information, or other things of value for himself")) (other citations omitted).

The Ninth Circuit focuses on one sentence of the *Dirks* decision—that is, that the "elements of fiduciary duty and exploitation of nonpublic information also exist when an insider makes a gift of confidential information to a trading relative or friend," Pet. App. 12 (quoting *Dirks*, 463 U.S. at 664)—to hold that a gift of material nonpublic information by an insider to a relative or friend constitutes a *per se* personal benefit to the insider. But

this sentence cannot be read in a vacuum. A "gift of the profits" is not a crime: only fiduciary breaches (or a "misappropriation") in making the trade may be. *See United States v. O'Hagan*, 521 U.S. 642 (1997). It cannot be that any purely emotional or familial benefit received by the tipper constitutes an "exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature." *Newman*, 773 F.3d at 452. To rule otherwise would eviscerate over three decades of judicial development of tippee liability since *Dirks*, and any tip to a friend or relative could suffice to jail the tipper irrespective of any receipt of concrete benefit from the exchange.

Consistent with principles of *ejusdem generis* and *noscitur a sociis*, the sentence should be read in the context of the entire opinion. *Cf. Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) ("a word is known by the company it keeps (the doctrine of *noscitur a sociis*) [which] we rely upon to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words").

When read in context, it is clear that the *Dirks* Court's inclusion of the sentence relied on by the Ninth Circuit was meant to explain that a relative or friend relationship can be evidence of the "*elements* of fiduciary duty and exploitation" and that an individual cannot do indirectly—through a straw—what he or she cannot do directly. *Dirks*, 463 U.S. at 664 (emphasis added). But the mere relationship, without some personal benefit being provided to the alleged tipper, is a not a breach of any duty.[5]

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5. The Ninth Circuit states that the Second Circuit "itself recognized that the 'personal benefit is broadly defined to include

Allowing the requirement of a personal benefit to be written out of existence as long as the tippee is a "trading relative or friend" also creates the problem of providing no guidance as to where the line is drawn on the relationship that triggers this exception. Are all relatives no matter how distant the connection included? For example, would a second cousin once removed be a "relative" for this definition? Application of the "friend" exception is even more problematic. Will the Department of Justice's (or the SEC's) next argument be that if a tipper is providing a tippee with information the two must *a fortiori* be friends (and thus nothing objective or consequential need have changed hands)?

The bottom line is that *Newman* correctly held that, under *Dirks*, tippee liability requires that the tipper receive a personal benefit that is concrete, objective and "of some consequence." *Newman*, 773 F.3d at 452; *see also United States v. Jiau*, 734 F.3d 147, 153 (2d Cir. 2013) ("enter[ing] into a relationship of *quid pro quo* . . . could yield future pecuniary gain"). This requirement—that something "of some consequence" must have changed hands—should not be limited in its application to those situations in which the tippee is remote from the tipper;

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not only pecuniary gain, but also, *inter alia*, the benefit one would obtain from simply making a gift of confidential information to a trading relative or friend.'" Pet. App. 16 (quoting *Newman*, 773 F.3d at 452). However, the next sentence of the Second Circuit's decision makes clear that such a relationship does not eliminate the requirement of a personal benefit: "[t]his standard, although permissive, does *not* suggest that the Government may prove the receipt of a personal benefit by the mere fact of a friendship, particularly of a casual or social nature." *Newman*, 773 F.3d at 452 (emphasis added).

it should apply to every alleged tipping transaction. To hold otherwise would allow the Government to get its nose under the tipper tent—which entry will be used by both the Department of Justice and the SEC to drive the herd through the village.

The Ninth Circuit's elimination of the benefit requirement based upon the relationship between the tipper and tippee must be reversed.

CONCLUSION

Amicus Mark Cuban is not suggesting that the bar against archetypal insider trading—trading by an insider (directly or indirectly) based on material nonpublic information in breach of the insider's fiduciary duty—should be discarded. But he strongly believes that insider trading should be defined in a manner that allows individuals to know with certainty whether a trade is legal or illegal *before* they engage in the transaction. While this Court cannot require Congress to act, it can rein in the Government's attempts to expand the reach of insider trading proscriptions by rejecting the Ninth Circuit's elimination of the personal benefit requirement and holding that the standard articulated by the Second Circuit in *United States v. Newman* is the correct one.

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Respectfully submitted,

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